MALAYSIAN REPORTS

SM.O. OTHAMAN CHETTIAR v. ANG GEE BOK

[O.C.J. (Chang Min Tat J.) August 3, 1970]

[Ipoh — Civil Suit No. 486 of 1966]

Moneylenders — Claim for repayment — Promissory note — Denial of loan in sum alleged — Evidence — Limitation.

Advocates and Solicitors — Practice — Importance of keeping attendance-slips — Keeping aide-memoires.

Three days before the expiry of the 6 years' period of limitation, the plaintiff instituted this action to recover payment of $4,000 he alleged to have lent to the defendant on the security of a promissory note and for interest accrued at the agreed statutory rate. The defence was a denial of the loan in the sum alleged. The sum of $400 only was admitted as having been received and it was alleged that this sum was not handed to the defendant in the presence of the solicitor who attested the promissory note at the time of the execution.

Held: on the evidence the plaintiff had not, even on a balance of probability, established the loan alleged or rebutted the direct evidence of the defendant.

Per Chang Min Tat J.: "Attendance-slips as they are usually called in the profession must be seen to be of the utmost importance not only in recalling past events to mind but also for purposes of taxation of costs. It is, I realise, not part of my duty nor should it be my presumption to advise solicitors on how they should or should not carry out their work but I would venture, with some diffidence, to suggest that solicitors would do well to bear in mind the possibility of their being called to the witness stand."

[Editorial Note: The plaintiff's appeal to the Federal Court (Federal Court Civil Appeal No. 81 of 1970) was withdrawn on January 18, 1970.]

Case referred to:-

(1) *Gulwant Singh* v. *Abdul Khalik* [1965] 2 M.L.J. 55, F.C.

CIVIL SUIT.

Gurdev Singh for the plaintiff.

Lim Boon Seng for the defendant.

Chang Min Tat J.: This was a claim by a moneylender for the repayment of $4,000 alleged to have been lent by him to the defendant on the security of a promissory note and for interest accrued at the agreed statutory rate of 18%. The defence was a denial of the loan in the sum alleged. The sum of $400 only was admitted as having been received and it was alleged that this sum was not handed to the defendant in the presence of the solicitor who attested the pro-note at the time of the execution.

As so often happens, the plaintiff moneylender was at all relevant times resident in India. His business of moneylending was operated in this country by an attorney. In this particular instance, the attorney who gave evidence was a different person from the attorney who made the alleged loan. His evidence was therefore limited to his reading out the entries in the account books kept by the previous attorney and the pro-note. He had no personal knowledge whatsoever of this transaction. There was also no evidence or any explanation why the lending attorney was not available to give evidence.

It was however suggested by counsel for the plaintiff that his evidence must be viewed in the light of the evidence given by the attesting solicitor and in this light it was said his evidence became in a sense substantial, pertinent and relevant. With respect, I confess myself not at all sure of this submission but the solicitor should, in normal circumstances, be able to prove the loan or the circumstances in which the loan was made. What this particular solicitor testified however was as to his general practice in attesting pro-notes, a practice which he said was invariable of explaining the contents, assuring that the money was lent or passed and witnessing and attesting the signatures of the parties to the loan. He said not one word about this particular transaction and in fact, he opened his testimony by a clear cut admission that he could not recall it at all.

Apparently this solicitor did not appreciate the clear advantages of keeping written *aide-memoires* of attendances on clients and other parties, to which he could make reference by way of refreshing his memory to recall the events of any particular transaction. Attendance-slips as they are usually called in the profession must be seen to be of the utmost importance not only in recalling past events to mind but also for purposes of taxation of costs. It is, I realise, not part of my duty nor should it be my presumption to advise solicitors on how they should or should not carry out their work but I would venture, with some diffidence, to suggest that solicitors would do well to bear in mind the possibility of their being called to the witness stand. In this particular instance, the solicitor not only did not keep any attendance-slip but also did not use the pro-note beyond identifying his signature which was on it, to refresh his memory. He, as I noted, categorically stated that he could not recall anything about this particular transaction.

In the context therefore of the evidence, particularly that of the plaintiff's attorney, I must necessarily hold that the plaintiff had not, even on a balance of probability, established the loan of $4,000 to the defendant or rebutted the direct evidence of the defendant which I accepted that he had merely borrowed $400 and that previous to the pro-note. In this connection, I admit to being impressed by the testimony of the defendant. He did not seek to resort to any false defence of not understanding the basic terms in Malay of a loan and he had throughout given evidence that was remarkably consistent with his defence, even though the defence was filed some 4 years earlier. Above all, I was impressed by the evidence of the circumstances of his life which he gave. He had need of some money but in those circumstances, certainly not of such a considerable sum as $4,000. I bore in mind the plausibility of an experienced and practised liar and that witnesses so often perjured themselves for their material benefit but I did not consider the defendant to be anything but a simple villager to whom the defence he put up must be something beyond his powers of invention unless it was the truth. Further, his circumstances did not appear to make him a justifiable risk for any unsecured loan of $4,000.

I also accepted the defendant's evidence of partial repayment. For myself, I could not see how or

why a moneylender should await till 3 days before the expiry of the 6 years' period of limitation particularly in the case of an unsecured borrower before instituting his action, unless some repayment had been made. On the authority, if any was needed, of *Gulwant Singh* v. *Abdul Khalik*[1] the claim was for this reason also unenforceable.

Counsel for the defendant further relied on the fact that the accounts of the moneylender in respect of this transaction referred to one Ang Gee Aik. Since the name of the defendant was Ang Gee Bok, which was also the name appearing in the pro-note, he submitted that the accounts produced did not refer to this transaction and that consequently no accounts had been kept, so that the transaction by this breach of section 18 of the Moneylenders Ordinance became unenforceable. As I understood him, the basis of his submission was that there was no presumption available to the plaintiff of due and proper compliance on his part with the law regarding moneylending and the plaintiff must therefore prove by positive evidence that he had fully complied with the requirements of law before he could enforce the repayment of the loan. Despite the submission of counsel for the plaintiff that since the addresses were the same, the names must be the same, it seemed to me, that the word "Aik" was so patently different from "Bok" that it could not be suggestive of an error in transcript. There was, in my judgment, a certain force in the submission of counsel for the defendant, but in view of my previous finding, there was no necessity for me to decide on this, though it did appear to me to be a substantiation of the allegation of the defendant that he was lent not $4,000 but $400 only.

I accordingly dismissed the claim with costs.

Claim dismissed.

Solicitors: *Gurdev Singh & Co.; Lim Boon Seng.*

KWONG LING v. THE COMMISSIONER OF THE FEDERAL CAPITAL OF KUALA LUMPUR

[A.Cr.J. (Abdul Hamid J.) August 22, 1970]
[Kuala Lumpur — Criminal Appeal No. 15 of 1970]

Local Government — Nuisance notice — Default in compliance with requisitions of — Abatement order — Municipal Ordinance (S.S. Cap. 133), ss. 246 and 247.

The Commissioner made a complaint against the appellant for default in complying with the requisitions of a nuisance notice issued under section 246 of the Municipal Ordinance. The appellant was summoned to answer a charge for failing to comply with such notice under section 246 (6) (b) of the Ordinance and on his plea of guilty was fined $25. Subsequently the magistrate issued a notice to the appellant to show cause why an abatement order requiring compliance with all the requisitions of the nuisance notice should not be made against him. After hearing the appellant the learned magistrate decided that it was proper that the order be made. On appeal,

Held, dismissing the appeal: (1) in the particular circumstances of the case the learned magistrate had not erred in law when he found that this was a fit and proper case for making an abatement order;

(2) the proceedings which preceded the making of such order were in form and substance part of the proceedings for default. An abatement order made after conviction of the appellant was perfectly regular.

Case referred to:-

(1) *Re Chung Lit and Chung Ah Kam* [1952] M.L.J. 123.

MAGISTRATE'S CRIMINAL APPEAL.

Kwok Yoke How for the appellant.

Ajaib Singh (Senior Federal Counsel) for the respondent.

Cur. Adv. Vult.

Abdul Hamid J.: This is an appeal against an abatement order issued by the learned magistrate Kuala Lumpur to the appellant on 14th February 1970.

A complaint was made by Pesurohjaya Ibu Kota* Kuala Lumpur on 17th September 1968 against the appellant for default in complying with the requisitions of a nuisance notice issued under section 246 of the Municipal Ordinance. The appellant was summoned to answer a charge for failing to comply with such notice under section 246(6)(b) of the said Ordinance. The appellant pleaded guilty and was fined $25. Subsequently the magistrate issued a notice to the appellant to show cause why an abatement order requiring compliance with all the requisitions of the nuisance notice should not be made against him. After hearing the appellant the learned magistrate decided that it was proper that the order be made.

The appellant now appeals. The two main grounds of appeal are as follows —

"(a) The learned magistrate erred in law in holding in his grounds of judgment that as the question of a closing order did not arise in the summons it was not proper for him to grant a closing order.

(b) The learned magistrate was wrong and had no jurisdiction to issue the notice requiring your petitioner to show cause why an abatement order should not be made as section 247 of the Municipal Ordinance (Cap. 133) provided that a summons under that section should be in Form G of Schedule A of the said Ordinance."

It is revealed from the record that the appellant urged the court below to issue a closing order instead of the abatement order. The learned magistrate however felt that primarily the hearing of the summons was to determine whether or not the appellant could show cause against the issue of the abatement order. He concluded that a closing order did not arise at all in the summons. He expressed the view that as far as the Municipality was concerned the building was still fit for human habitation.

The appellant argued that this was against the weight of evidence. It was submitted that the architect (D.W. 3) had given evidence to the effect that the building was in advanced state of dilapidation and was unfit for human habitation. On examining the evidence of D.W. 3 I am unable to find any evidence to that effect. What D.W. 3 said was that he advised the

* The Commissioner of the Federal Capital.